

1
2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 DESIREE STEPHENSON,

6 Plaintiff(s),

No. C 12-0426 PJH

7 v.

ORDER RE MOTION TO DISMISS

8 NEUTROGENA CORPORATION

9 Defendant(s).
10 _____/

11 Defendant Neutrogena Corporation's motion to dismiss came on for hearing before
12 this court on July 25, 2012. Plaintiff Desiree Stephenson ("plaintiff") appeared through her
13 counsel, Mark Todzo. Defendant Neutrogena Corporation ("defendant") appeared through
14 its counsel, Matt Powers. Having read the papers filed in conjunction with the motion and
15 carefully considered the arguments and relevant legal authority, and good cause
16 appearing, the court hereby GRANTS in part and DENIES in part defendant's motion to
17 dismiss as follows.

18 Defendant first moves to dismiss (or alternatively to strike), for lack of standing, all of
19 plaintiffs claims to the extent that they relate to products that were not actually purchased
20 by plaintiff. Specifically, defendant points out that plaintiff alleges causes of action related
21 to six of the Neutrogena Naturals products, even though plaintiff claims to have purchased
22 only one product, the purifying facial cleanser. Both parties cite a number of cases in
23 support of their position. See, e.g., Larsen v. Trader Joe's Co., No. 3:11-cv-5188, Dkt. 41
24 (N.D. Cal. June 14, 2012) (dismissing claims related to products not purchased by plaintiff);
25 Mlejnecky v. Olympus Imaging America Inc., 2011 WL 1497096 (E.D. Cal. Apr. 19, 2011)
26 (same); Carrea v. Dreyer's Grand Ice Cream, Inc., 2011 WL 159380 (N.D. Cal. Jan. 10,
27 2011) (same); but cf. Astiana v. Dreyer's Grand Ice Cream, Inc., 2012 WL 2990766 (N.D.
28 Cal. July 20, 2012) (denying motion to dismiss as to products not purchased by plaintiff);
Cardenas v. NBTY, Inc., 2012 WL 1593196 (E.D. Cal. May 4, 2012) (same). Ultimately,

1 the court finds that the Astiana/Cardenas cases are less persuasive here, because the
2 products at issue in those cases were more similar than the Neutrogena Naturals products
3 at issue here. In both Astiana and Cardenas, the purchased product(s) were similar
4 enough to the unpurchased products such that an individualized factual inquiry was not
5 needed for each product. The court does not find that to be the case here, and thus
6 DISMISSES with prejudice plaintiff's claims to the extent that they relate to products that
7 were not actually purchased by plaintiff.

8 Defendant also moves to dismiss under Rule 9(b), arguing that some of plaintiff's
9 state law claims are based in fraud, and thus must be pled with particularity. As to any
10 claims that relate to products not purchased by plaintiff, those claims have been dismissed,
11 thus mooted defendant's motion. As to plaintiff's claims related to the purifying facial
12 cleanser, the court finds that plaintiff has properly set forth the "who, what, where, when,
13 and how" of the alleged fraud, and thus DENIES defendant's motion to dismiss under Rule
14 9(b).

15 Finally, defendant moves to dismiss plaintiff's claims for injunctive relief, based on
16 the argument that plaintiff has not demonstrated a risk of future injury. Preliminarily, the
17 court notes that plaintiff has not asserted a "claim" for injunctive relief, but rather has
18 included a "prayer" for injunctive relief. While defendant correctly notes that plaintiff has not
19 alleged that she intends to purchase the purifying facial cleanser (or any other Neutrogena
20 Naturals product) in the future, it is still possible that plaintiff would purchase those products
21 if the alleged misrepresentations are corrected. Thus, the court STRIKES plaintiff's prayer
22 for injunctive relief with leave to amend, so that plaintiff can add an allegation to that effect,
23 and may then appropriately include the prayer for injunctive relief.

24 Defendant also requests that the court take judicial notice of the product labeling
25 and/or packaging for the Neutrogena Naturals products at issue. As to the products that
26 were not purchased, the court finds that they are no longer relevant to the case, and thus
27 denies defendant's request. As to the purifying facial cleanser, the court grants defendant's
28 request to take judicial notice of the product's label (attached as Exhibit A to defendant's
request for judicial notice).

1 **IT IS SO ORDERED.**

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3 Dated: July 27, 2012



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5 PHYLLIS J. HAMILTON
6 United States District Judge
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